SHORT FORM ORDER

INDEX No. 17-603567
CAL. No. 18-01811MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 11-8-18 (001)
MOTION DATE 1-31-18 (002)
ADJ. DATE 2-28-19
Mot. Seq. # 001 - MD
 # 002 - XMG

---X

NICOLE MORGAN,

Plaintiff,

- against -

JOHN A. MCMAHON and JOHN E. MCMAHON,

Defendants.

---X

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Upon the following papers read on this e-filed motion and cross motion for summary judgment : Notice of Motion/Order to Show Cause and supporting papers dated September 26, 2018 ; Notice of Cross Motion and supporting papers dated January 17, 2019 ; Answering Affidavits and supporting papers dated January 16, 2019 ; Replying Affidavits and supporting papers_; Other __; (~~and after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED that the motion by defendants for an order granting summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the cross motion by plaintiff for summary judgment in her favor on the issue of liability is granted.

This is an action to recover damages for injuries sustained by plaintiff when her vehicle was struck in the rear by a vehicle owned by defendant John E. McMahon and operated by defendant John A. McMahon. The accident allegedly occurred on April 30, 2014, at approximately 10:25 a.m., on East Main Street in Islip, New York. By her bill of particulars, plaintiff alleges that, as a result of the subject accident, she sustained serious injuries and conditions, including bulging discs in the cervical region, cervical and lumbar radiculopathy, and sprain or strain in the spine.

Defendants move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102 (d).

Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose, and use of the body part (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, defendants failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Reitz v Seagate Trucking, Inc.***, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). On March 12, 2018, approximately four years after the subject accident, defendants' examining orthopedist, Dr. Marc Chernoff, examined plaintiff and performed certain orthopedic and neurological tests, including the straight leg raising test, the impingement sign, and the anterior drawer sign. Dr. Chernoff found that the results for the straight leg raising test and the anterior drawer sign were positive. Dr. Chernoff also performed range of motion testing on plaintiff's cervical and lumbar regions, shoulders and right knee, using a goniometer to measure her joint movement. Dr. Chernoff found that plaintiff had significant range of motion restrictions in her lumbar region: 25 degrees of flexion (normal 90 degrees), 5 degrees of extension (normal 30 degrees), 15 degrees of lateral bending (normal 20 to 25

degrees), 40 degrees of left rotation and 20 degrees of right rotation (*see* ***Jean v New York City Tr. Auth.***, 85 AD3d 972, 925 NYS2d 657 [2d Dept 2011]; ***Reitz v Seagate Trucking, Inc.***, *supra*). He also found significant range of motion restrictions in plaintiff's cervical region: 20 degrees of flexion (normal 60 degrees), 25 degrees of extension (normal 30 degrees), 20 degrees of lateral bending (normal 30 to 45 degrees), 50 degrees of rotation. With respect to plaintiff's right knee, Dr. Chernoff indicated that flexion was 90 degrees (normal 140 degrees). Dr. Chernoff failed to compare plaintiff's cervical and lumbar rotations to the normal range of motion (*see* ***Rivera v Gonzalez***, 107 AD3d 500, 967 NYS2d 60 [1st Dept 2013]; ***Lopez v Felton***, 60 AD3d 822, 875 NYS2d 550 [2d Dept 2009]; ***Perez v Fugon***, 52 AD3d 668, 861 NYS2d 86 [2d Dept 2008]). Moreover, Dr. Chernoff provided ranges of degrees up to 15 degrees for the normal standards of comparison for cervical lateral bending (*compare* ***Spencer v Golden Eagle, Inc.***, 82 AD3d 589, 920 NYS2d 24 [1st Dept 2011]; *see* ***Lee v M & M Auto Coach, Ltd.***, 2011 NY Slip Op 30667[U], 2011 NY Misc Lexis 1131 [Sup Ct, Nassau County 2011]). When a normal reading for range of motion testing is provided in terms of a range of degrees rather than one definitive degree, the actual extent of the limitation is unknown, and the Court is left to speculate (*see* ***Sainnoval v Sallick***, 78 AD3d 922, 911 NYS2d 429 [2d Dept 2010]; *see also* ***Lee v M & M Auto Coach, Ltd.***, *supra*). It is also noted that although Dr. Chernoff indicated that the range-of-motion limitations in plaintiff's cervical and lumbar regions and the right knee were self-imposed, he failed to explain or substantiate, with objective medical evidence, the basis for that conclusion (*see* ***Mercado v Mendoza***, 133 AD3d 833, 834, 19 NYS3d 757 [2d Dept 2015]; ***Uvaydov v Peart***, 99 AD3d 891, 951 NYS2d 912 [2d Dept 2012]; ***Iannello v Vazquez***, 78 AD3d 1121, 911 NYS2d 654 [2d Dept 2010]). In view of the foregoing, Dr. Chernoff's report is insufficient to establish a prima facie case that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).

Inasmuch as defendants failed to meet their prima facie burden, it is unnecessary to consider whether the papers submitted by plaintiff in opposition to the motion were sufficient to raise a triable issue of fact (*see* ***McMillian v Naparano***, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]; ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]). Accordingly, defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff's injuries failed to meet the serious injury threshold of Insurance Law § 5102 (d) is denied.

Plaintiff cross-moves for summary judgment in her favor on the issue of liability on the ground that she was not negligent, and that the subject accident was solely the result of defendant John A. McMahon's failure to control his vehicle. In support, plaintiff submits, *inter alia*, the pleadings and her affidavit.

In her affidavit, plaintiff states that prior to the accident, she had been traveling westbound on East Main Street. She stopped at the intersection with Oakland Street for a pedestrian to cross the road. While completely stopped, her vehicle was struck in the rear by defendants' vehicle.

It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed, to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*see* Vehicle and Traffic Law § 1129 [a]; ***Gibson v Levine***, 95 AD3d 1071, 944 NYS2d 610 [2d Dept 2012]; ***Zweeres v Materi***, 94 AD3d 1111, 942 NYS2d 625 [2d Dept 2012]; ***Nsiah-Ababio v Hunter***, 78 AD3d 672, 913 NYS2d 659 [2d Dept 2010]). Moreover,

a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on wet pavement or some other reasonable excuse (*see* ***Fajardo v City of New York***, 95 AD3d 820, 943 NYS2d 587 [2d Dept 2012]; ***Giangrasso v Callahan***, 87 AD3d 521, 928 NYS2d 68 [2d Dept 2011]; ***Ortiz v Hub Truck Rental Corp.***, 82 AD3d 725, 918 NYS2d 156 [2d Dept 2011]).

Here, plaintiff established her prima facie entitlement to summary judgment, as she demonstrated that her vehicle was struck in the rear by defendants' vehicle. The burden then shifted to defendants to come forward with a non-negligent explanation for the accident.

In opposition, defendants contend that there is an issue of fact as to whether plaintiff was free from comparative fault. At his deposition, John A. McMahon testified that he observed two pedestrians crossing the road, and that plaintiff's vehicle was stopped when his vehicle struck her vehicle in the rear. Defendants have failed to provide a nonnegligent explanation for the rear-end collision (*see* ***Bene v Dalessio***, 135 AD3d 679, 22 NYS3d 237 [2d Dept 2016]; ***Brothers v Bartling***, 130 AD3d 554, 13 NYS3d 202 [2d Dept 2015]; ***Xian Hong Pan v Buglione***, 101 AD3d 706, 955 NYS2d 375 [2d Dept 2012]). Although defendants contend that plaintiff's sudden stop caused the accident, John A. McMahon was under a duty to maintain a safe distance between his vehicle and plaintiff's vehicle. In any event, to be entitled to summary judgment on the issue of liability, plaintiff is not required to show freedom from comparative fault in establishing her prima facie case (*see* ***Rodriguez v City of New York***, 31 NY3d 312, 76 NYS3d 898 [2d Dept 2018]; ***Edgerton v City of New York***, 160 AD3d 809, 74 NYS3d 617 [2d Dept 2018]). Thus, plaintiff's cross motion for summary judgment in her favor on the issue of liability is granted.

Dated: July 15, 2019
Riverhead, New York

WILLIAM G. FORD J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION